UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT DAYS,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 91-204 B***
	)	
LOUIS W. SULLIVAN, M.D.,	)	
in his capacity as Secretary	)	
of Health and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's finding that plaintiff Robert Days retains the ability to perform a full range of light work despite swollen and painful ankles.

[1] This action is properly brought under 42 U.S.C. ' 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 26, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since February 1989 and meets disability insured status requirements from that date through June 30, 1990,[2] Findings 1-2, Record p. 15; that he has ``severe arthralgias and myalgias,[3] ankle pain of unknown cause, chronic bronchitis, obesity, hyperlipidemia, hypertension, diminished hearing and a functional heart murmur," but that he does not have any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 3, Record p. 15; that his ``allegations concerning his impairments and their impact on his ability to work are not credible," Finding 4, Record p. 15; that he does not suffer from significant nonexertional limitations, Finding 5, Record p. 15; that he is unable to perform his past relevant work, Finding 6, Record p. 15; that he has the residual functional capacity to perform the full range of light work, Finding 7, Record p. 15; that the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the ``Grid"), direct a conclusion that he is not disabled, Finding 11, Record p. 15; and that he was not disabled at any time through the date of decision, Finding 12, Record p. 15. The Appeals Council declined to review the decision,[4] Record pp. 3-4, making it the final determination of the Secretary. 20 C.F.R.

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[2] This is Days' third application for disability insurance benefits. Following an unfavorable determination on his second application for supplemental social security income, Days filed suit in federal court for benefits through 1989 which resulted in a court-approved stipulated agreement awarding him disability benefits for the period beginning June 28, 1984 and ending in October 1986. The current application is for benefits beginning November 1986. Record pp. 20-21.

[3] Arthralgia is ``[p]ain in a joint." *Taber's Cyclopedic Medical Dictionary* 124 (14th ed. 1983). Myalgia is ``[t]enderness or pain in the muscles; muscular rheumatism." *Id.* at 920.

[4] In doing so, the Council rejected the plaintiff's contention that the Secretary failed to consider the testimony of a vocational expert, noting that the Administrative Law Judge did in fact discuss the testimony and affirming his conclusions as supported by the evidence presented. Record p. 3.

' 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record therefore must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff contends that the record does not contain affirmative evidence supporting a finding that he has the residual functional capacity to perform the full range of light work.[5] Specifically,

[5] The plaintiff also contends that the record does not support the Secretary's finding that the plaintiff is not disabled under the Grid. At the hearing the Administrative Law Judge questioned vocational expert Cynthia A. Flint-Ferguson about, among other things, unskilled jobs requiring light exertion that would be available to the plaintiff. Record pp. 39-43. In response to two hypothetical scenarios the expert found no jobs available because of the plaintiff's asserted inability to stand or walk during work hours for a minimum of six hours. *Id.* In determining the availability of work for the plaintiff the Administrative Law Judge stated that he discounted the vocational expert's opinion because it was based, in part, on assertions of fact that were not subsequently substantiated. *Id.* p. 14. Specifically, he noted that Flint-Ferguson's opinion was based on the assumption that the plaintiff had significant nonexertional postural restrictions, which he concluded was invalid. *Id.* Accordingly, he did not rely

the plaintiff challenges the Secretary's finding that he can stand or walk for the periods of time required for such work.

During his testimony the plaintiff complained of pain and of restrictions on, among other things, sitting, standing, walking and lifting. He noted that he can only sit for one-half hour and stand for ``no more than a minute, the slight[est] movement when I'm standing still would twist my whole back out completely . . . . " Record p. 29. Days also testified that he can walk only about 100 yards slowly, is unable to lift anything with his left arm, but can lift up to 20 pounds with his right arm, although such activity causes his ``right joint" to ache ``like it's pulling [] apart." *Id.* p. 30. As reported in December 1989 by a treating physician, Dr. Geoffrey M. Gratwick, the plaintiff complained that he was experiencing

> intermittent aches, particularly around his wrists, ankles and forefoot. His back has continued to both[er] him moderately. The patient was in his usual state of health until [ab]out one week ago when he had the onset of significant discomfort beginning in his left ankle after driving all day. . . . [H]e has relatively little in the way of other acute joint complaints. Although his wrist and CMC joints [cont]inue to bother him a good deal.

Id. p. 470.

The medical evidence presented in the case indicates that the plaintiff has at times suffered from tender swollen ankles, although it is noted in the most recent reports that the swelling has subsided. In his December 1989 report Dr. Gratwick stated: ``[Days has a] warm swollen left ankle

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on the vocational expert's answer to the hypothetical questions. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (``[I]n order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities.")

with exquisite tenderness on the medial aspect. Minimal MTP joint pain." *Id.* Following a visit the next month Dr. Gratwick commented that after treatment with an injection to the plaintiff's left ankle: ``[the] pain basically went away completely. However, since that time he has had the onset of modest discomfort, around his right ankle. . . . He has continued to be fairly active, driving. . . . Minimal swelling around either ankle. . . ." *Id.* p. 469. In a January 1990 report another treating physician, Dr. Charles S. Burger, responded, in apparent partial reference to the plaintiff's ``darkened red ankle" and a complaint of discomfort while walking, that the plaintiff was ``improving slowly." *Id.* p. 475. Later that year, in a report dated June 18, 1990, Dr. Burger stated that the plaintiff takes 200 m.g. of Clinoril twice daily as treatment for chronic joint and muscle pain felt mostly in his ankles and wrists, although the physician found that there was ``no obvious deformity or swelling of the joints" at that time. *Id.* pp. 509-10.

None of the examining physicians' reports in the record address the question of attending physical limitations or residual functional capacity. Nor do any of them note the plaintiff's asserted extreme limitations of only being able to stand without moving about for one minute or walk one hundred yards. The only medical evidence containing a specific assessment of the plaintiff's residual functional capacity is a report by non-testifying, non-examining physician Dr. John M. Yindra. *Id.* pp. 443-50. The assessment, reported in a check-the-box format, states that the plaintiff is capable of lifting a maximum of 50 pounds, 25 pounds frequently, and that he can stand or walk for about six hours per day. *Id.* p. 444. The physician provided a short explanation for his opinion, a part of which is unintelligible: ``(1) [Patient] has a chronic pain syndrome with [?]; (2) objective signs of disease X-rays are unrevealing and there is no laboratory evidence to suggest lupus[6] except one minimally

[6] It is unclear whether Dr. Yindra's notation regarding lupus refers to the plaintiff's ankle pain because ``when the word is used alone, it has no precise meaning." *Taber's Cyclopedic Medical*

elevated ANA which subsequently retested [normal]. . . . Probably suffers from mild OA; (3) BP under treatment . . . ." *Id.*

As a basis for finding the plaintiff capable of performing light work the Administrative Law Judge noted that Days ``performs household chores and continues to drive an automobile despite discomfort" and that during an examination by Dr. Gratwick in January 1990 the plaintiff ``showed evidence of only minimal swelling in either ankle." *Id.* p. 13; *see also id.* pp. 426, 432, 469. He further commented that, ``[i]f the claimant were capable of only standing for a minute, it is likely that his physicians would have made some mention of this limitation in their report." *Id.* p. 13. The Administrative Law Judge made no mention of Dr. Yindra's report.

Light work requires that an individual be able to stand or walk for approximately six hours per eight-hour workday. *See* 20 C.F.R. ' 404.1567(b); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* at 51 (Supp. 1991). The plaintiff's residual functional capacity for light work must be established by substantial evidence; the Secretary cannot rely on a presumption of capacity. *See Rosado*, 807 F.2d at 294.

Although ``the Secretary is [not] precluded from rendering common-sense judgments about functional capacity based on medical findings," the Court of Appeals for the First Circuit has held as a general proposition that, ``since bare medical findings are unintelligible to a lay person in terms of residual functional capacity, the [Administrative Law Judge] is not qualified to assess residual functional capacity based on a bare medical record." *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (citing *Id.* at 293) (citations omitted). The court also explained that, although in one case it decided that the report of a non-testifying, non-examining physician ``cannot be the

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Dictionary 838 (14th ed. 1983).

substantial evidence needed to support a finding," its later decisions demonstrate that that holding is not an absolute rule. *Id.* at 328 (citing *Tremblay v. Secretary of Health & Human Servs.*, 676 F.2d 11, 13 (1st Cir. 1982) (conclusory opinion of a treating physician about the plaintiff's condition twenty years beforehand need not be accorded greater weight than that of a non-examining medical advisor)). Such reports, the court stated, are ``entitled to some evidentiary weight, which `will vary with the circumstances, including the nature of the illness and the information provided the expert.'" *Id.* (quoting *Rodriguez*, 647 F.2d at 223 (reports of highly qualified experts relying on extensive relevant documentation could be accorded evidentiary value where they were confined to the question of equivalency of an impairment to those listed in the Secretary's regulations)).

Despite the fact that the Secretary appears to have made his own determination of the plaintiff's residual functional capacity, the question this court must resolve is whether there is substantial evidence in the record to support that determination, not whether his finding is actually based on such evidence. *See id.* at 329. The record indicates that Days received medical treatment in the form of an injection for an ankle condition of ``exquisite tenderness." Thereafter his condition subsided and he improved slowly while continuing to take medication. However, nowhere in the record is there medical evidence addressing the relationship between such improvement and the extent to which the plaintiff did or did not stand or walk during the period of improvement. Nor does the record disclose whether or not standing or walking for about six hours per eight-hour workday would cause the aggravated stage of the plaintiff's condition to recur.

The requirement that the record contain positive evidence supporting the Secretary's findings regarding the plaintiff's capacity to meet the exertional requirements of light work in some circumstances may be satisfied by the confluence of an examining physician's report and a subsequent residual functional capacity assessment by a non-testifying, non-examining physician. *Gordils*, 921

F.2d at 329. In *Gordils* the court concluded that an examining physician's finding that the patient had a ```weaker back,' in general terms," and a non-testifying, non-examining physician's residual functional capacity assessment ``together constitute substantial evidence to support the Secretary's finding that claimant could perform sedentary work." *Id.* However, while in that case the Secretary was able to render a common-sense, lay judgment that the plaintiff had the capacity for sedentary work[7] by extrapolating from both the examining physician's diagnosis of a slight impairment -- a ```weaker back,' in general terms" -- and the non-testifying, non-examining physician's residual functional capacity assessment, such a judgment by the Secretary as to Days' capacity for the more physical demands of light work at issue here is inappropriate on the present record. Indeed, the First Circuit expressed a similar concern in *Gordils*: ``Although we think it permissible for the Secretary as a layman to conclude that a `weaker back' cannot preclude sedentary work, we would be troubled by the same conclusion as to the more physically demanding light work." *Id.* The absence of both a residual functional capacity assessment by an examining physician and a medical evaluation relating the plaintiff's improved condition to the extent of his walking and standing leaves unanswered a critical

[7] In *Gordils* the Administrative Law Judge actually found that the plaintiff was capable of performing a full range of light work, but the Court of Appeals declared this finding troublesome. *Gordils*, 921 F.2d at 329. The court concluded, however, that substantial evidence supported the Secretary's finding that the plaintiff was not disabled because the Grid would direct that the plaintiff was not disabled even if he was capable of performing only sedentary work. *Id.* at 329-30. However, this analysis is inapplicable to the facts of the present case. If Days is physically capable of performing sedentary but not light work, the Grid dictates that because of his age, education and skill level, as found by the Administrative Law Judge, he is disabled. Grid Rules 201.14, 202.14; *see* Findings 8-11, Record p. 15.

factual question. There simply is insufficient information in the present record to allow for a determination that Days is capable of standing or walking for the minimal periods required to perform light work. Therefore, in this case the reports of the examining and non-examining physicians fail to provide the substantial evidence necessary to support the Secretary's finding that the plaintiff can perform light work.

For the foregoing reasons, I recommend that the Secretary's decision be ***VACATED*** and the cause ***REMANDED*** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of April, 1992.

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David M. Cohen
United States Magistrate Judge